EXTREME SYSTEM SDN BHD A

v.

HO HUP CONSTRUCTION COMPANY BHD & ORS (NO 4)

HIGH COURT MALAYA, KUALA LUMPUR B
MAH WENG KWAI JC
[SUIT NO: D-22 NCC-146-2010]
17 DECEMBER 2010

CIVIL PROCEDURE: *Affidavits - Use of affidavits filed in previous proceedings - Affidavits filed in pursuance of investigation for Suruhanjaya Syarikat Malaysia (SSM) - Effect of - Whether affidavits and its contents could only be used for purposes of SSM's investigations - Whether there had been an implied undertaking by investigating officers to only use affidavits for purposes of investigation - Whether disclosure of contents of affidavits had been for an ulterior or alien or collateral purpose* C D

EVIDENCE: *Affidavits - Use in evidence - Affidavits duly filed into court for another suit - Whether affidavits became public documents pursuant to s. 74 of the Evidence Act 1950 - Evidence Act 1950, s. 74*

EVIDENCE: *Statement - Statements by investigation officers of Suruhanjaya Syarikat Malaysia (SSM) - Statements subsequently reduced into affidavit form - Purpose for which affidavits made - Whether investigating officers could be called to admit contents of affidavits - Whether statements recorded in affidavits could be used for purposes other than investigation - Factors to consider* E F

The plaintiff filed this action against the 1st defendant and 28 others to secure the defendants' compliance with the Malaysian Code on Take-Overs and Mergers 1998 and the Securities Commission Act 1993. Pending the trial of this case, investigations were commenced by the Suruhanjaya Syarikat Malaysia ('SSM') into complaints made against the 2nd, 3rd and 5th defendants ('said defendants') for alleged offences under s. 69E and F of the Companies Act 1965 ('Act'). As a result of the investigations, proceedings were commenced by the SSM against the said defendants ('SSM OS') for injunctive relief, restraining the said defendants from voting in the EGM to be held. The SSM summoned various persons to give statements and to provide various documents and information to the investigating officers, which said statements were then set out in affidavit form and filed into court to support the SSM OS ('Impugned Evidence'). A consent order was then entered in respect of the SSM OS. Counsel for the plaintiff at the opening of his case herein, informed the court that he intended to call the investigating G H I

officers who had filed the affidavits in the SSM OS as witnesses ('SSM Witnesses'), in order to put into evidence the impugned evidence obtained by the investigating officers during the SSM investigations. The defendants' counsel objected and raised a preliminary objection on the admissibility of the impugned evidence on the ground that there had been an implied undertaking by the SSM and the SSM witnesses not to disclose the impugned evidence except for the purposes of the SSM investigations ('PO'). The sole issue that arose for consideration before this Court was whether there had been an implied undertaking by the SSM Witnesses, not to disclose the affidavits which had contained the impugned evidence, except for the purposes of the SSM investigations.

Held (dismissing defendants' PO):

(1) The plaintiff would be allowed to call the SSM witnesses for the purposes of admitting the impugned evidence through their witness statements in court. The disclosure sought by the plaintiff of the impugned evidence through the SSM witnesses had not been for an ulterior or alien or collateral purpose. (para 14.1)

(2) In this case, the impugned evidence had been contained in the SSM witnesses' affidavits which had been filed in court and it had been served on the defendants in the SSM OS case. Thus these affidavits, although not read in open court, had been in the public domain and had been public documents pursuant to s. 74 of the Evidence Act 1950. As such, they had not been caught within the ambit of the implied undertaking as set out in the Riddick and Taylor principles. As the affidavits filed would have been deemed read by the learned judge, the implied undertaking would cease to be binding on the SSM witnesses. (para 15.9)

(3) The said defendants would presumably have answered the SSM witnesses' questions truthfully in the course of recording their statements. As it was always in the best interests of justice that all relevant documents and information be placed before the court during trial to enable the court to arrive at a just decision, the calling of the SSM witnesses for the purposes of admitting the impugned evidence would no doubt assist the court in arriving at the truth of the issues at hand. The determination of the truth ought to outweigh the private right to confidentiality and the public interest in protecting that confidentiality. (paras 19-20 & 22)

Case(s) referred to:

Bunn v. British Broadcasting Corporation [1998] 3 All ER 552 ***(refd)***
Crest Homes Plc v. Marks & Others [1987] 1 AC 829 ***(refd)***
Harman v. Secretary of State for the Home Office [1983] AC 280 ***(refd)***
IJM Corporation Bhd v. Harta Kumpulan Sdn Bhd (No 2) [2008] 8 CLJ 308 HC ***(refd)***

Mahon & Anor v. Rahn & Ors [1998] QB 424 ***(refd)***
Microsoft Corporation & Ors v. SM Summit Holdings Ltd & Anor [1999] 4 SLR 529 ***(refd)***
Prudential Assurance Co Ltd v. Fountain Page [1991] 1 WLR 756 ***(refd)***
Riddick v. Thames Board Mills Limited [1977] 1 QB 881 ***(refd)***
Taylor v. Serious Fraud Office [1999] 2 AC 177 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 4(1), 7(1), 7(4), 69D, 69E, 69F, 69L, 69M, 69N, 368A(1)(a), (b)
Evidence Act 1950, s. 74

Other source(s) referred to:
IA Tokley, *Company Securities - Disclosure of Interests*, p xxv

For the plaintiff - S Suhendran (William Leong & Yap Soon Lee with him); M/s William Leong & Co
For the 1st defendant - SN Raj; M/s James Monteiro
For the 2nd, 4th - 7th defendants - Rabindra Nathan (M Sujintana with him); M/s Shearn Delamore & Co
For the 3rd & 8th defendants - Conrad Young (S Ravindran with him); M/s Sreenavasan Young
For the 9th, 13th, 15th, 17th, 20th & 29th defendants - Ranjit Singh (Gregory Ling with him); M/s Ranjit Singh & Yeoh
For the 10th, 12th, 16th defendants - Chew Chang Min; M/s Chew Chang Min
For the 11th defendant - Steven Wong; M/s Ariffin & Partners
For the 22nd, 23rd, 24th & 28th defendants - Foo Li Mei; M/s Foo Li Mei & Siong

Reported by Sharmini Pillai

JUDGMENT

Mah Weng Kwai JC:

Facts Of Case

[1] On 27 January 2010 the plaintiff filed this action against the 1st defendant, Ho Hup Construction Company Bhd (Ho Hup) and 28 others. In it the plaintiff sought to secure the compliance by the defendants with the Malaysian Code on Take-Overs and Mergers 1998 (the Code) and the Securities Commission Act 1993 (the SCA). In particular the plaintiff sought *inter alia*, the following reliefs:

(a) A declaration that the 2nd to 29th defendants are parties acting in concert in the acquisition of control of Ho Hup.

(b) A declaration that the 2nd to 29th defendants have breached the Code and the SCA in failing to make a mandatory general offer for the shares of Ho Hup.

A (c) An order directing the 2nd to 29th defendants or one or more of them to make a mandatory general offer for the shares in Ho Hup in accordance with the provisions of the Code and/or the SCA.

(d) Special and/or general damages and/or equitable compensation.

B (e) Damages at common law for conspiracy to injure.

(f) Punitive damages and

(g) Costs.

C **[2]** Pending trial in this case investigations were commenced by Suruhanjaya Syarikat Malaysia (the SSM) into complaints made against the 2nd, 3rd and 5th defendants for alleged offences under s. 69E and F of the Companies Act 1965 (the Act).

D **[3]** In the course of investigations statements were recorded by the investigation officers of SSM. The powers to investigate are under s. 7D of the Act. Witnesses are obliged to answer all questions including questions to which the answers may be self-incriminating.

[4] As a result of the investigations, proceedings were commenced by E the SSM against the 2nd, 3rd and 5th defendants by way of an Originating Summons *vide* Kuala Lumpur High Court Case No: D-24NCC-67-2010 (the SSM OS) for injunctive relief to restrain the 2nd, 3rd and 5th defendants from voting at an EGM of the 1st defendant to be held on 4 February 2010.

F **[5]** The main ground of the application in the SSM OS was that the 2nd, 3rd and 5th defendants failed to disclose as required under ss. 4(1), 7(1), 7(4), 69D, 69E, 69F, 69L, 69M, 69N, 368A(1)(a) and (b) of the Act, their acquisition of shares in Ho Hup.

G **[6]** The SSM summoned various persons to give statements and to provide various documents and information to the investigation officers. These statements, information and documents obtained were then set out in affidavits affirmed by the investigation officers and filed in court in support of the SSM OS (the impugned evidence). These affidavits are H comprised in jilid 5 to jilid 9, part C of the plaintiff's bundle of documents. A consent order was entered in the SSM OS case where the 2nd and 5th defendants were restrained from exercising their voting rights to shares in the 1st defendant.

[7] On 29 October 2010 when the plaintiff opened its case counsel I for the plaintiff informed the court that he intended to call the investigation officers who had filed the affidavits in the SSM OS as

witnesses. The court was also informed that the witness statements of the investigation officers had been prepared and served on the defendants. The objective in calling the investigation officers as witnesses was to put in evidence the impugned evidence obtained by the investigation officers during the SSM investigations.

[8] The plaintiff intended to call 11 investigation officers (the SSM witnesses).

[9] Counsel for the defendants gave notice that he would be raising "a substantial preliminary objection as to the admissibility of the evidence that the SSM Witnesses were intending to give, in so far as the same relates to the impugned evidence, in this trial".

[10] Preliminary Objection By The 2nd, 4th To 7th Defendants

Counsel for the defendants very ably framed the following issues for the court to consider before arriving at a decision on the preliminary objection.

(a) Whether the Impugned Evidence comprising information and documents obtained, and statements that have been recorded, by the SSM Witnesses in the course of the Investigation into the possible commission of the Offences under the Act, is subject under common law to an implied undertaking imposed on SSM and the SSM Witnesses, such that the Impugned Evidence, having been obtained under compulsion using the coercive powers of the SSM under the Act, is to be used, consistent with the undertaking, only for the purposes of the Investigation and the SSM Action, being proceedings that arise directly out of the Investigation?

(b) Whether the Impugned Evidence can be used, or disclosed to third persons, for purposes other than the Investigation and the SSM Action?

(c) Whether the Impugned Evidence will be admissible at the trial stage of the instant action before this Honourable Court?.

In brief, the preliminary objection is taken against the admissibility of the impugned evidence through the affidavits of the SSM witnesses on the ground that there is an implied undertaking by the SSM and the SSM witnesses not to disclose the impugned evidence except for the purposes of the SSM investigations only.

[11] The preliminary objection was strenuously resisted by counsel for the plaintiff.

[12] The Defendants' Case

12.1. Counsel for the defendants traced the development of the principle of implied undertaking at common law in civil proceedings relating to discovery. The principle is that information disclosed in the course of discovery in an earlier action is subject to the implied undertaking and that such information cannot be used in proceedings under a different course of action.

12.2. Counsel for the defendants referred to the following cases to show the development of the principle till the present day.

(i) *Riddick v. Thames Board Mills Limited* [1977] 1 QB 881 where Lord Denning MR held that the appellant was not entitled to use a memorandum which was obtained by compulsion through discovery of documents as the basis of a subsequent action for defamation.

(ii) *Harman v. Secretary of State for the Home Office* [1983] AC 280 where the House of Lords found a solicitor guilty of contempt of court for using documents belonging to the other party to the litigation obtained in the course of discovery, for some collateral or ulterior purpose of his own.

(iii) *Crest Homes Plc v. Marks & Others* [1987] 1 AC 829 where Lord Oliver of Aylmerton in the House of Lords decision held that a solicitor who, in the course of discovery in an action obtains possession of copies of documents belonging to his client's adversary gives an implied undertaking to the court not to use that material nor to allow it to be used for any purpose other than the proper conduct of that action on behalf of his client. The House of Lords also held that the principle of implied undertaking not only covered documents but also information derived from it.

(iv) *Prudential Assurance Co Ltd v. Fountain Page* [1991] 1 WLR 756 where the principle of implied undertaking was held to include statements of witnesses that were served but not used in an action that was settled.

(v) *Mahon & Anor v. Rahn & Ors* [1998] QB 424 where the Court of Appeal held that the principle of implied undertaking did not apply to criminal proceedings and that

there was no abuse of process for the plaintiff to commence an action for libel in reliance upon the letter which had been disclosed to them by the prosecution in the criminal proceedings.

(vi) *Bunn v. British Broadcasting Corporation* [1998] 3 All ER 552 where Lightman J held that statements made under caution to the police in the course of a criminal investigation enjoyed confidentiality and that there was an implied undertaking that the information was to be used only for the purpose for which it was provided and not for any extraneous purpose whatsoever.

(vii) *Taylor v. Serious Fraud Office* [1999] 2 AC 177 where Lord Hoffman, in the House of Lords decision overruling the Court of Appeal decision in *Mahon v. Rahn (supra)* concluded that there was an implied undertaking by the prosecution not to disclose any unused material for any collateral purpose.

(viii) *Microsoft Corporation & Ors v. SM Summit Holdings Ltd & Anor* [1999] 4 SLR 529 where the Singapore Court of Appeal referred to the Riddick principle and applied the decision in *Taylor v. Serious Fraud Office (supra)*. The court noted that the undertaking is owed to the court and to the party which gave the discovery.

12.3. Counsel for the defendants urged the court to apply the Riddick and Taylor principles to the present case and to hold that the SSM Witnesses should not be allowed to be called as plaintiff's witnesses to admit the impugned evidence.

[13] The Plaintiff's Case

13.1. Counsel for the plaintiff agreed that the Riddick principle applies to criminal proceedings as well.

13.2. However, counsel contended that the Riddick principle does not apply to the present case for *inter alia*, the following reasons:

(a) there is no collateral purpose in the calling of the SSM Witnesses.

(b) the affidavits of the SSM Witnesses have been filed in court and are in the public domain.

A **[14] Decision Of The Court**

14.1. Upon reading the written submissions of counsel for the plaintiff and the defendants and upon hearing the oral submissions, the court dismissed the preliminary objection and allowed the plaintiff to call the SSM Witnesses for the purpose of admitting the impugned evidence through their witness statements in court.

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14.2. The defendants being dissatisfied with the decision of the court now appeals against the said decision.

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[15] Reasons For The Decision

15.1. The court agrees and accepts that the Riddick principle applies to civil proceedings in Malaysia. Lord Denning MR in the *Riddick* case held that "discovery of documents is a most valuable aid in doing of justice. The court orders the parties to a suit - both of them - to disclose on oath all documents in their possession or power relating to the matters in issue in the action and that confidential information has no privilege from disclosure". However, Lord Denning went on to say that "compulsion is an invasion of a private right to keep one's documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires. The Court should, therefore, not allow the other party or anyone else - to use the documents for any ulterior or alien purpose". Hence the implied undertaking by a party to civil proceedings who has obtained documents and/or information from the other party by compulsion through discovery shall not disclose such documents and/or information otherwise than in proceedings for which the discovery was given. The law recognizes that the obtaining of documents and information under compulsion through discovery is a serious invasion of a private right and public interest in the right to confidentiality.

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15.2. The implied undertaking is given by the party obtaining the documents and information not only to the other party to the litigation but also to the court. (See *Microsoft Corporation & Ors v. SM Summit Holdings Ltd & Anor (supra)*)

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15.3. It is also abundantly clear from the judgment of Lord Denning that the Riddick principle is not absolute or cast in stone. The court will not allow anyone to use the documents or information received if they are used "for any

ulterior or alien purpose". This in effect means that where the disclosure is for a *bona fide* and related purpose, the disclosure should be allowed by the court. What is an ulterior or alien or collateral purpose will be a question of mixed fact and law to be determined in the circumstances of each case.

15.4. The extent of the implied undertaking may be modified by the court according to the needs of justice in the case. (See *Prudential Assurance Co Ltd (supra)*).

15.5. The House of Lords in the case of *Crest Homes Plc (supra)* held that:

> But the implied undertaking is one which is given to the Court ordering discovery and it is clear and is not disputed by the appellants that it can, in appropriate circumstances, be released or modified by the Court.

15.6. The issue of "release or modification" of the implied undertaking will be discussed later in this judgment.

15.7. The court also accepts that the Taylor principle which embodies the Riddick principle applies to criminal proceedings in Malaysia as well. The House of Lords in dismissing the appeal in the Taylor case held:

> ... that in order to ensure that the privacy and confidentiality of those who made, and those who were mention in, statements contained in unused material which had come into existence as a result of a criminal investigation were not invaded more than was absolutely necessary for the purposes of justice, compliance by the prosecution with its obligation to disclose all such material to the defence generated an implied undertaking not to use the material for any purpose other than the conduct of the defence.

In deciding on whether the implied undertaking extends to documents and information obtained as part of a criminal investigation, Lord Hoffman considered the issue as being "... whether the public interest in the administration of justice requires the application of an analogous (Riddick) principle to documents disclosed by the prosecution to the defence in criminal proceedings". Lord Hoffman concluded that the disclosure of documents by the prosecution to the defence created an implied undertaking not to use them for any collateral purpose.

15.8. In the present case the main issue to be determined by the court is whether the disclosure of the impugned evidence obtained by the SSM Witnesses in their course of their investigations as investigation officers under the Act, for purposes of this trial will amount to a disclosure for a ulterior or alien or collateral purpose.

15.9. No ulterior or alien or collateral purpose

I am of the considered view that the disclosure sought by the plaintiff of the impugned evidence through the SSM Witnesses is not for an ulterior or alien or collateral purpose. I say this for the following reasons:

(i) An alien or collateral purpose would mean a purpose that is wholly unrelated and different from the declared purpose. In the House of Lords case of *Crest Homes plc (supra)* Lord Oliver had this to say:

> ... It must not be used for any "collateral or ulterior" purpose, to use the words of Jenkins J. in *Alterskye v. Scott* [1948] 1 All ER 469, approved and adopted by Lord Diplock in *Harman*'s case, p. 302. Thus, for instance, to use a document obtained on discovery in one action as the foundation for a claim in a different and wholly unrelated proceeding would be a clear breach of the implied undertaking: see *Riddick v. Thames Board Mills Ltd* [1977] QB 881.

(ii) I would venture to add that an ulterior purpose may import a purpose that is *mala fide*.

(iii) In the present case, I agree with the submission of counsel for the plaintiff that the disclosure of the impugned evidence is for a similar and related purpose namely to secure the compliance by the defendants with the Code and the SCA.

(iv) The SSM had filed the SSM OS to enforce the disclosure requirements under division 3A part IV of the Companies Act. As submitted by counsel for the plaintiff, the policy or purpose to enforce the disclosure requirements is to ensure that the shareholders of Ho Hup benefit from the disclosure. With the information disclosed, the shareholders of Ho Hup will be able to know or identify the "controlling shareholders" in Ho Hup. It will be important to enable the shareholders to:

(a) monitor the behaviour of the market place.

(b) limit the potential opportunities for insider trading and

(c) maintain an 'informed market' in which the market will be able to access the value of investing in corporations.

(See: *Company Securities - Disclosure of Interests* by I.A Tokley - page xxv).

(v) The affidavits filed by the SSM witnesses containing the impugned evidence in the SSM OS was for the purpose of protecting the shareholders of Ho Hup. The SSM OS was to restrain the 2nd, 3rd and 5th defendants from voting on their shares in Ho Hup.

(vi) The purpose of the plaintiff in calling the SSM witnesses in this case to admit the affidavits in the SSM OS is for a similar purpose namely, to protect the interests of the shareholders of Ho Hup. There is no ulterior, alien or collateral purpose on the part of the plaintiff that can be discerned by the court.

(vii) The several persons interviewed by the SSM witnesses as investigation officers in the course of the investigations were obliged by law to answer all questions put to them truthfully. They were not to withhold disclosure of information and/or documents required by the SSM witnesses. There seems to be no cogent reason why such disclosure of the impugned evidence cannot be adduced as evidence in a civil suit filed by the plaintiff as a shareholder where the plaintiff will be the beneficiary of such disclosure.

The SSM OS Affidavits Are Public Documents

[16] The affidavits of the SSM witnesses were filed in the SSM OS case in court. Once filed the affidavits are public documents and are said to be in the public domain. Although the SSM OS did not proceed to trial as a consent judgment was entered into between the SSM and the 2nd and 5th defendants, the affidavits were nonetheless before the court and would have been deemed read by the learned judge. Any person on payment of a fee will be able to do a file search and take copies of the affidavits.

[17] In *Taylor*'s case *(supra)* (at p. 117) Lord Hoffman held that an implied undertaking will cease to apply when the document is read to the court or by the court.

[18] Syed Ahmad Helmy J (as he then was) in the case of *IJM Corporation Bhd v. Harta Kumpulan Sdn Bhd (No 2)* [2008] 8 CLJ 308 at 328 when deciding on the issue of whether a letter between the defendant and its solicitors was privileged communication and hence not admissible under s. 126 of the Evidence Act 1950, held that the privilege did not extend to the solicitor's letter in question as the defendant had waived privilege on the ground that the letter became a public document when it was attached as an exhibit to the affidavit filed in court and that the affidavit had been served on the plaintiff's solicitors. In para. 44 of the judgment, His Lordship said:

> ... As the affidavit was filed in court and read together with its exhibits in court, the letter in question became a public document and the plaintiff was right to argue that the veil of privilege was lost. The defendant at this stage cannot seek to restore the cloak of privilege to the letter in question. In *See Teow Chuan & Anor*, Abdul Kadir Sulaiman JCA was dealing with whether a legal opinion exhibited in an affidavit filed and used in court could continue to be privileged thereafter. The learned judge in arriving at his decision quoted the following line from *Derby & Co Ltd and Ors v. Weldon and Ors (No. 10)* [1991] 2 All ER 908 which merits reproduction here:
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> > Where a party deployed material in court in an interlocutory application, privilege that could otherwise be claimed in relation to that and associated material would be treated as waived altogether, with the result that the party could not then assert privilege for the same material at the subsequent trial.
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> [45] Having referred to it, Abdul Kadir Sulaiman JCA then went on to conclude in *See Teow Chuan & Anor*.
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> > As the legal opinion was exhibited in the affidavit and deployed in court in the striking out application by the defendant and was also read out in open court by counsel for both parties, the privilege was clearly waived altogether.

[19] Likewise in this case, the impugned evidence are contained in the SSM witnesses' affidavits which have been filed in court and served on the defendants in the SSM OS case. To reiterate the position it is my finding and judgment that as the SSM witnesses' affidavits, although not read in open court, are in the public domain and they are public documents pursuant to s. 74 of the Evidence Act 1950. And being public documents, they are in my view not caught within the ambit of the implied undertaking set out in the Riddick and Taylor principles.

[20] In the present case as the affidavits filed would have been deemed read by the learned judge, the implied undertaking would cease to be binding on the SSM witnesses.

Plaintiff Can Cause The 2nd, 3rd And 5th Defendants To Discover In Any Event

[21] The 2nd, 3rd and 5th defendants being parties to the SSM OS were served with the affidavits filed by the SSM Witnesses. Being in possession of these affidavits, there would have been nothing to prevent the plaintiff from filing an application for the discovery of the affidavits by the 2nd, 3rd and 5th defendants, if the plaintiff deemed it necessary, in which case the said defendants would have to disclose the said affidavits. This process alone would have put paid to the defendants' argument that there was an implied undertaking by SSM Witnesses not to disclose the affidavits.

The Truth To Prevail

[22] The 2nd, 3rd and 5th defendants would have presumably answered the SSM witnesses' questions truthfully in the course of the recording of their statements. As it is always in the best interests of justice that all relevant documents and information be placed before the court during trial to enable the court to arrive at a just decision, thus the calling of the SSM witnesses for the purpose of admitting the impugned evidence will no doubt assist the court in arriving at the truth of the issues at hand. The determination of the truth ought to outweigh the private right to confidentiality and the public interest in protecting that confidentiality.

The Converse Argument

[23] What if the defendants, for reasons of their own, wanted to tender the SSM witnesses' affidavits in evidence?. I would have thought that the plaintiff will find it extremely difficult to object to the admissibility of the affidavits by reason of the implied undertaking given by the SSM and the SSM witnesses, especially when the affidavits are for a similar purpose.

[24] In the result, the court allowed the plaintiff to call the 11 SSM Witnesses to tender their affidavits. The SSM and the SSM witnesses for reasons stated above are released from their implied undertaking. I hasten to add that the defendants will still be able to object to the contents in the SSM witnesses' affidavits on the ground of relevancy.